IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-111

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

SCOTIA COAL CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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To the United States Court of Appeals for the Sixth Circuit

Petitioner prays that a writ of certiorari be issued to review the decision rendered in this cause on April 28, 1978, by the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The Judgment incorporating the jury verdict in the United States District Court, entered on August 19, 1975, appears in the Appendix (A-1).*

* Parenthetical page references followed by the letter "a" refer to the page of the printed Appendix hereto.

The Memorandum entered by the District Court on August 30, 1976, dealing with UMW's post-trial motions for judgment N.O.V. or a new trial, is unreported and appears in the Appendix (A-1 to A-10).

The Amended Judgment entered in the District Court on August 30, 1976, appears in the Appendix (A-10 to A-11).

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was entered on April 28, 1978, and this petition for writ of certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

1. Is there sufficient evidence to sustain a verdict against UMW under the Sherman Act on the theory that UMW, in its wage negotiations with Scotia, insisted upon its standard agreement pursuant to an anti-competitive Union-employer conspiracy, and sought thereby to impose ruinous wage standards upon Scotia?

2. Did the District Court and Court of Appeals err in upholding a verdict against UMW based on a finding of a conspiracy to impose a ruinous wage standard where, in the negotiations involved, Scotia did not deny but admited an ability to meet the standards and where Scotia offered, but UMW rejected, the following alternatives: (1) Agreement at substantially below UMW standards; or (2) Agreement at UMW standards but coupled with a UMW promise not to organize an affiliated mine?

STATUTES INVOLVED

The Statutes relevant to the issues in this case are: 15 USC Sec. 1, 2, 15 and 17 (Sections 1, 2, 15 and 17 of the Sherman Act); 29 USC Sec. 52 (Section 20 of the Clayton Act); and 29 USC Sec. 102 and 104 (Sections 2 and 4 of the Norris-LaGuardia Act). These are reprinted in the Appendix (A-12 to A-17).

STATEMENT OF THE CASE

Scotia is a corporation organized in 1961, operating a deep coal mine in Letcher County, Kentucky, producing approximately one million tons annually. Scotia is a subsidiary of Blue Diamond Coal Company, a corporation which had operated deep mines since 1923 in Kentucky, Tennessee and Virginia, and which, at the time in question, had amassed a net worth of approximately $19,000,000.00 (JA 43, 46, 54, 59).*

By 1965, both the Scotia mine and the Leatherwood mine, Blue Diamond's only remaining mine, were operating under a contract with the "Southern Labor Union" (SLU) as employee representative (JA 43, 53-55, 300).

A UMW organizing drive at Scotia in 1965 led to an NLRB election resulting in UMW's certification as bargaining representative on March 7, 1966 (JA 226, 229, 393).

Wage negotiations began, and when the parties could not reach agreement, UMW called a strike on June 1, 1966. In the six formal negotiating meetings between Scotia and UMW.

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* Parenthetical page references preceded by "JA" refer to the page of the printed joint Appendix forming part of the record below, which record is not being filed with this petition.

three of which occurred before the strike, the parties started and remained poles apart (JA 227-236).

At no time in the negotiations did UMW insist upon the terms of the National Bituminous Coal Wage Agreement as amended in 1964. In fact, both its wage and welfare demands *exceeded* the level of the 1964 agreement. Scotia's offers fell substantially below the level of the National Agreement (JA 228-233).

At no time in the negotiations did Scotia claim an inability to pay UMW's demand. In fact, in discussions between Blue Diamond President Bonnyman and UMW Vice-President Titler, Blue Diamond's position was that it *could* and *would* sign the contract, assuming local problems could be worked out, but if and only if UMW would agree not to attempt to organize Blue Diamond's Leatherwood Mine. Bonnyman's testimony leaves no doubt about Scotia's ability to meet the terms of the contract:

> Q. Did you indicate to him at that meeting that you could afford to sign a contract at Scotia but not Leatherwood?
>
> A. I indicated to him and to the other officials up until that meeting that we could entertain the idea of signing a contract at Scotia. Although we felt and subsequent events have proven, that signing a contract at the mine under the conditions under which it was operating would have resulted in a shift in the mine from a profitable operation to a very marginal operation with a substantial investment there.
>
> Q. Did you indicate a willingness to sign the contract with Scotia at that meeting?
>
> A. We indicated that we would. We never said we would sign a contract but we said we would entertain the idea

> of signing a contract subject to working out certain coal conditions, but we could not afford to do it in the Leatherwood field.
>
> Q. Did you make a proposal that would involve some sort of arrangement at Leatherwood?
>
> A. We in substance, the substance, that we were willing to do and, of course, we did not lay it completely flat on the table, but in substance, that what we indicated was that if they would leave us alone in the Leatherwood field and if we could work out some of the local problems at Scotia, that we would sign with them. Subsequent events proved that this would have been a very disastrous course at Scotia.
>
> Q. Did Mr. Titler say anything as to whether the Mine Workers would do that, or not?
>
> A. There was never any indication that they were willing to do this. (JA 299-300)

Because of the impasse in the formal sessions, because UMW would not sacrifice the organizational rights of Leatherwood employees for a Scotia contract, the strike occurred. Additional meetings were held, but with no meaningful progress (JA 232, 234-236).

Although the strike involved extensive picketing (Scotia obtained an injunction against picketing, which was later modified to permit nine picketers at one time), there is no pattern in the evidence of violence by the picketers, and there were no attempts by Scotia to obtain contempt citations for picketing violations (JA 239).

The strike continued for about a year, but was eventually broken as Scotia employees found employment elsewhere or returned to work at Scotia. The company had been able to resume production on a limited basis as early as July, 1966,

employing returning strikers in part, and new employees in part (JA 246-250).

Scotia brought this action under Sections 1 and 2 of the Sherman Act, claiming that UMW conspired with large coal operators—primarily those of the Bituminous Coal Operators Association (BCOA)—to force Scotia and other small coal producers out of business. Jurisdiction was conferred on the United States District Court, Eastern District of Kentucky, by 15 USC Sec. 15.

Scotia contends that the conspiracy began in 1950 with the formation of the BCOA, coupled with a contemporaneous agreement between UMW and BCOA to impose the provisions of the National Bituminous Coal Wage Agreement of 1950 on all coal mine operators, knowing that small, non-mechanized operators would be unable to meet the contract terms.

Scotia claims that the conspiracy continued through the 1964 and 1966 Amendments to the National Agreement, and that UMW was acting pursuant to the conspiracy when it insisted on the terms of the National Agreement in 1966 contract negotiations with Scotia.

The allegations of conspiracy, in general, are similar to those made in other cases involving UMW.[1] Since this Court is well-acquainted with those cases, UMW believes it would serve no purpose to review the record of this case in depth. There are, however, critical factual distinctions between this case and the others which will be explored at appropriate points.

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[1] *UMWA v. Pennington*, 325 F.2d 804 (6 Cir. 1963), rev'd 381 US 657 (1965), opin. on remand 257 F.Supp. 815 (E.D. Tenn. 1966), aff'd 400 F.2d 806 (6 Cir. 1968), cert. denied, 393 US 983. *Ramsey v. UMWA*, 416 F.2d 655 (6 Cir. 1969), rev'd 401 US 302 (1971), opin. on remand, 344 F.Supp. 1029 (E.D. Tenn. 1972), aff'd 481 F.2d 742 (6 Cir. 1973), cert. denied 414 US 1067. *Tenn. Consolidated Coal Co. v. UMWA*, 416 F.2d 1192 (6 Cir. 1969), cert. denied 397 US 964. *UMWA v. South-East Coal Co.*, 434 F.2d 767 (6 Cir. 1970), cert. denied 402 US 983.

UMW denied the existence of any conspiracy, contending that its wage demands on Scotia were motivated by its own historic policy, dating back to 1890, of seeking uniform wages, decent and safe working conditions, and various fringe benefits, and did not result from agreement with BCOA or any coal operator. Absent proof of such agreement by a preponderance of the evidence, UMW cannot be held in violation of the Sherman Act.

There was no direct evidence of conspiracy at the trial. All testimony of officials of UMW and BCOA, the alleged conspirators, contained direct denials (A-3). The District Court denied UMW's motion for directed verdict. The jury returned a verdict for Scotia, and the Court denied UMW's motions for judgment N.O.V. or new trial, noting four areas of indirect evidence from which the jury "might" have inferred a conspiracy (A-4 to A-7).

These four areas of evidence were (1) the Protective Wage Clause of the 1958 National Agreement, (2) the 80-cent clause of the 1964 National Agreement, (3) the fact that since 1950 and the formation of the BCOA, UMW has approved no contract "except under national terms," and (4) the stated preference of UMW and BCOA leaders for "concentration of the coal industry in strong hands."[2]

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[2] Citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 US 690 (1962), the District Court reminds us that the evidence is to be viewed as a whole, without compartmentalizing the facts and without wiping the slate clean after scrutiny of each circumstance. We, of course, have no quarrel with that rule. We do not understand, however, that a point-by-point analysis of the evidence is inappropriate and it is impossible to discuss the matter in any other way. Indeed, this is the way the evidence is discussed in the other conspiracy cases cited above. Neither do we understand the rule entitles any trier of fact to find a conspiracy by some vague intuitive process. "Either there is some agreement, combination, or conspiracy, or there is not" and it must be found in the evidence. *US v. Morgan*, 118 F. Supp. 632, 634 (D.C. S.D. N.Y. 1953).

Considering first the fact that UMW since 1950 has approved no contract except under national terms, it should be noted that the District Court in *Ramsey* (344 F. Supp. 1029, 1037) dealt with the identical question, finding no special significance in the post-1950 period, pointing out that "it appears clear from the evidence that national uniformity in wage rate and labor standards in the coal industry has been a consistent policy and goal of the UMW since its inception in 1890."

More importantly, it is clear from *Pennington* (381 U.S. 657, 665) that no inference of conspiracy may be drawn from the mere fact of UMW insistence on uniform wage demands:

> Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. *Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy* (emphasis added).

If, as *Pennington* holds, a wage demand based on a policy of uniformity is not evidence of conspiracy in a particular case, how can it be evidence of conspiracy that the same goal of uniformity has been consistently pursued in all other cases? Motivation for the wage policy, not consistency of application of the wage policy, is the issue. Consistency of application of the wage policy indicates nothing about whether the policy was formed unilaterally or by forbidden agreement. Precisely because it is impossible to divine the motive from the conduct, *Pennington* has established that an inference of conspiracy cannot spring from the conduct alone. This holding simply em-

bodies the equal inference rule, to the effect that where two inferences are equally possible, with no basis to choose between, the party with the burden of proof cannot rely on the inference favorable to him to meet his burden. Thus, the District Court erred in holding that an inference of conspiracy could arise from UMW's consistent attempts to implement a uniform wage policy.

The District Court ignored this same rule in holding that the jury could have inferred a conspiracy from public expressions by UMW and BCOA leaders of preference for concentration of the coal industry in strong hands. Again, two inferences may be drawn. One is that these statements evidenced a conspiracy. The other is that the statements simply evidenced a coincidence of motives. Logic dictates that whether the expressions were independently arrived at or born in conspiracy simply cannot be divined from the mere fact that the statements were made.

The *Ramsey* District Court (344 F.Supp. 1029, 1037, 1038) properly assessed the issue of coincidence of motives:

> As regards any inference to be drawn from a competitive motive on the part of BCOA, upon further reflection it is apparent that in a competitive economy a competitive motive will be universal to all coal producers. To draw an inference of antitrust conspiracy from this motive would be somewhat of an anomaly . . . The Union was motivated to seek higher uniform wages and welfare benefits for its members. The BCOA was motivated to seek protection for its members from lower wage competition. A coincidence of motives does not of itself connote a Sherman Act conspiracy, nor does it make unilateral action to achieve these goals conspiratorial. Otherwise every employer and every union signing a collective bargaining agreement might well find themselves unavoidably exposed to an antitrust charge.

To hold otherwise would make the fears of Justice Goldberg a reality (*Pennington* dissent 381 US 715):

> The jury is therefore at liberty to infer such an [anti-competitive] agreement from . . . evidence that a union's philosophy that high wages and mechanization are desirable has been accepted by a group of employers and that the union has attempted to achieve like acceptance from other employers.

Because the jury could not *possibly* determine from the statements of UMW and BCOA officials whether they resulted from a legal coincidence of motives or illegal conspiracy, the District Court erred in holding that the jury might have drawn an inference of conspiracy from the mere making of the statements.

The District Court also found that the Protective Wage Clause[3] was susceptible of a construction which would support an inference of conspiracy by the jury. The Court explained its decision to allow the jury to construe the PWC by noting that the Sixth Circuit, in *Tennessee Consolidated*, found the PWC

[3] PWC was proposed by UMW in 1958 negotiations as a means of protecting its members against the consequences of subcontracting. After controversy, the operators agreed to the provision. It required, in Paragraph B, that coal mined, produced, prepared, procured or acquired by signatory operators must be mined under labor standards as favorable to employees as those in UMW's contract. In negotiation of this provision, the operators sought and UMW agreed to a reciprocal commitment that UMW would enforce the agreement *to all signatories* thereto equally. This resulted in PWC's Paragraph A, which read:

> "During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto."

to be ambiguous and allowed the jury to determine its meaning (A-4).

UMW does not concede that the Courts have definitely ruled the PWC to be ambiguous in this line of conspiracy cases. Even if the PWC is ambiguous, the ambiguity must be resolved in favor of the UMW position, as a matter of law. It is true that the Sixth Circuit, in *Tennessee Consolidated* (416 F.2d 1192, 1198) did state that Judge Wilson held the PWC to be ambiguous in *Ramsey* (265 F. Supp. 388, 412), and that Judge Taylor held the same in *Pennington* (257 F.Supp. 815, 862).

In fact, Judge Taylor did *not* find the PWC ambiguous in *Pennington*. While allowing that "the language in Paragraph A is not as clear as it should be" (257 F. Supp. 815, 862), he stated in the very next paragraph, referring to the admissibility of testimony concerning the PWC:

> This testimony would only be competent if the contract is ambiguous. We understand that it is the position of both parties that the contract is not ambiguous.

Apparently, then, Judge Taylor found, as a matter of law, that the PWC was unambiguous, applied only to the signatories thereto, did not bind UMW to the same standards and conditions as to non-signatories, and thus was not evidence of conspiracy.[4]

Neither is Judge Wilson's position on the PWC accurately stated by the Sixth Circuit in *Tennessee Consolidated*. While he did mention in first *Ramsey* (265 F.Supp. 388, 412) that the PWC "is not without ambiguity," he clearly adopted the position advocated by UMW as a matter of law:

[4] The issue has not been considered by the Supreme Court. In the dissenting opinion in *Ramsey* (401 US 302, at 316) Justice Douglas remarked, with Justices Black, Harlan and Marshall concurring, ". . . There is not a word in the agreement, as I read it, that covers non-signatory operators."

> The law is well settled in this regard that where two constructions of a written contract are reasonably possible, preference must be given to that one which does not result in a violation of law . . . The Court must accordingly adopt the latter construction and conclude that the Protective Wage Clause did not by its terms forfeit the Union's exemption from the antitrust laws.

Judge Wilson reaffirmed this rule of construction as to the PWC in second *Ramsey* (344 F.Sup. 1029, 1034), and noted therein the Sixth Circuit's specific approval of that rule of construction in *Pennington* (400 F.2d 806, 814) and in first *Ramsey* (416 F.2d 655, 659).

This rule of construction is based on the same equal inference rule discussed above. Where two equally possible inferences can be raised, and the jury would have no basis to choose between, it is error to allow them to speculate.

In view of these decisions by Judge Taylor and Judge Wilson, and the Sixth Circuit's endorsement thereof prior to this case, UMW submits that the District Court here erred in allowing the jury to construe the PWC, which despite the Sixth Circuit's inaccurate comments in *Tennessee Consolidated*, must be construed as a matter of law in favor of UMW's position.

Additionally, in respect to the PWC, both *Tennessee Consolidated* and *South-East Coal Co.*, the cases in which the Sixth Circuit upheld jury verdicts, involved damage periods prior to 1964. The PWC was removed from the National Agreement in 1964, and the wage negotiations and strike at Scotia occurred in 1966. Even if an inference of conspiracy could arise from the language of the PWC (and as a matter of law it cannot), no such inference could be permitted in this case, where the conduct at issue occurred nearly two years after elimination of the PWC.

The final evidence noted by the District Court as possibly supporting a finding of conspiracy is the 80-cent clause,[5] appearing in the 1964 and 1966 National Agreements. In *South-East* (434 F.2d 767, 782), the Sixth Circuit discussed the 80-cent clause for the first and only time, in the antitrust context, making clear that the clause was to be construed in the same manner as the PWC.[6]

The Sixth Circuit did not find it necessary to pass on the legality of the 80-cent clause in *South-East*, and in discussing the sufficiency of the evidence to support the jury verdict of conspiracy, emphasized that while the circumstantial evidence (including the 80-cent clause) "in and of itself might not support the jury's verdict," there was *direct* evidence of conspiracy (involving not UMW, but two co-defendant operators) setting *South-East* apart from *Pennington* and *Tennessee Con-*

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[5] The 80-cent clause of the 1964 National Agreement replaced the PWC and reads as follows:

> "During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forty cents ($0.40) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal produced or acquired by any signatory Operator for use or for sale, (i.e. all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this Agreement, be paid into such Fund by each Operator signatory hereto or by any subsidiairy or affiliate of such Operator signatory hereto the sum of eighty cents ($0.80) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so produced or acquired on which the aforesaid sum of forty cents ($0.40) per ton had not been paid into said Fund prior to such procurement or acquisition."

It is to be observed there is no language in this provision which limits UMW in any way in its negotiations with non-signatory operators.

[6] "Reviewing the *Ramsey* decision's interpretation of *Pennington*, four conclusions may be drawn applicable to the present dispute. First, the National Agreement containing the Protective Wage Clause is, on its face, a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions. Second, if this agreement was made or entered into by the union in

solidated, and constituting substantial evidence to support the jury's verdict.

The Sixth Circuit did not intimate what its ruling on the 80-cent clause would have been, but clearly indicated that the criteria would be those on which the PWC is tested.

Since the 80-cent clause is, on its face, a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions in plain, unambiguous terms, dealing solely with the obligation of signatory operators, it could not provide a basis for finding a conspiracy. Even if by stretching the imagination, some language in the 80-cent clause might be read to bind UMW to hold non-signatories to the National Agreement, it would at most admit of two constructions dependent on motivation, one legal and one not, with the motivation not determinable from the contract language.[7] The Court

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pursuance of its own self interests, there are no grounds for concluding a violation of the antitrust laws. Third, if, however, the employers and union entered into this contract witih the conscious knowledge or intent that it would be used to drive competitors out of business (more than the incidental effects caused by the adoption of a uniform wage agreement which may result in certain operators not being able to function profitably), then a violation of the antitrust laws has occurred. Fourth, it is this either expressly or impliedly agreed-upon use of the valid contract, that is, that it will be used to drive competitors out of business, that comprises the agreement or conspiracy which is illegal for purposes of the antitrust laws. Without deciding the question of the legality of the "80-cent clause" suffice it to be said that these conclusions are also applicable to that provision."

[7] The National Labor Relations Board has upheld this provision as a labor standards provision under 29 USC 158 (e). *Int'l Union, UMWA, et al.*, 188 NLRB No. 121 (February 26, 1971). The Sixth Circuit Court of Appeals has found the provision violative of 29 USC 158(b) (4) and 158(e) in *Riverton Coal Co. v. UMW*, 453 F.2d 1035 (1972). *Riverton* did not, however, hold the provision to be violative of the Sherman Act. In the instant case the District Court charged the jury that should it find "the only agreement or understanding express or implied between the United Mine Workers of America and BCOA or any other group of coal operators

then must as a matter of law adopt the construction which does not violate the law, as demanded by the rule of construction discussed above in connection with the PWC, and specifically embraced by the Sixth Circuit in *Pennington* (400 F.2d 806, 814) and in second *Ramsey* (416 F.2d 655, 659). Therefore, the District Court again erred in allowing the jury to construe the 80-cent clause, and in holding that it could possibly support an inference of conspiracy.

In weighing the evidence, both as separate elements and as a whole, the District Court ignored the standard applicable to circumstantial evidence. Each of the four categories of evidence the Court mentioned as sufficient to support the verdict (consistent application of the national contract terms since 1950, the "stability" statements by UMW and BCOA officials, the PWC, and the 80-cent clause) "weigh no less equally in favor of unilateral action on the part of the Union than it does in favor of conspiratorial action on the part of the Union" (Second *Ramsey*, 344 F.Supp. 1029, 1038).

As to each element of evidence, the conduct or statement involved is not in itself unlawful, or evidence of conspiracy. In each instance, and taken as a whole, the conduct and statements at issue are perfectly lawful if motivated by unilateral UMW policy, and are unlawful if and only if motivated by conspiratorial agreement. In each instance, and as a whole, the District Court allowed the jury to infer unlawful motivation from the *naked fact* that the conduct occurred, or the statements were made. In so doing, the Court failed to perceive that at *most*, the conduct and statements, singly or as a whole, raise two possible

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. . . was the collective bargaining agreement known as the National Bituminous Coal Wage Agreement, then your verdict would be in favor of the United Mine Workers of America, unless you believe that this agreement was entered into pursuant to a conspiracy." This charge is to be understood as meaning the Court below construed the terms of the 80-cent clause not to constitute a Sherman Act conspiracy.

inferences as to motivation, with absolutely no basis for choice between.

In such a situation, the party with the burden of proof cannot possibly prevail, and as a matter of law, the trier of fact simply has no room to operate, and a jury verdict stands on nothing but rank speculation or prejudice.

The District Court in second *Ramey* correctly grasped this concept (344 F.Supp. 1029, 1038):

> As regards the totality of the evidence and the plaintiffs' contentions of a UMW-BCOA antitrust conspiracy, apart from what has been said in this or its former opinion, the Court is of the opinion that the most that can be said without engaging in impermissible speculation is that the motives of the UMW and the motives of the BCOA do appear to have coincided.

The Sixth Circuit has also recognized this concept in *South-East* (434 F.2d 767, 777-8):

> It appears that the "equal hypothesis rule" is simply a negative way of phrasing the rule of law that a plaintiff must sustain his burden of proof. Thus, if a plaintiff does not come forth with evidence, when considered in light of opposing evidence, from which a jury could infer the truth of an alleged proposition over its contra-proposition, the plaintiff has not met his burden of proof. When there are equal inferences which can be drawn from a particular set of facts—one inference indicating liability, the other non-liability—it is the judge's obligation at the direct verdict stage of the trial to find for the defendant. (Citations omitted.) It would not be proper under these circumstances for the trial judge to relinquish to the jury this responsibility by simply giving them an instruction to the effect that if they could not draw either an inference of liability or one of nonliability from the facts presented, they should conclude nonliability.

The District Court erred in refusing to grant UMW either a directed verdict or judgment N.O.V., since *all* the evidence which the Court advances as sufficient to support a jury verdict is at *most* equal inference evidence, and incapable, taken singly or cumulatively, of supporting a verdict for Scotia. In failing to reverse the District Court, the Court of Appeals grievously erred.

In reference to Question 2, involving Scotia's stated ability to pay the wages demanded by UMW, the District Court states in its memorandum that, "While the Bonnyman testimony could be viewed as supporting the interpretation placed upon it by UMW, it does not compel such a conclusion" (A-7). We emphatically disagree. The Bonnyman testimony is crystal clear: Scotia was prepared to agree to the contract and would do so if UMW would agree not to organize its Leatherwood mine. There is no ambiguity about it.

The District Court also emphasizes Bonnyman's testimony that it would have been "disastrous" for Scotia to have met the terms of the national contract (A-6). The reference, we submit, is out of context. See pages 4-5, *supra*. At the time, Bonnyman told Titler the contract would reduce Scotia's profitability and make it a "marginal" operation in light of the "investment". Bonnyman's "disastrous" comment was the product of hindsight without supporting data and without the slightest indication of to what extent or even when this "disaster" would have occurred.

The District Court ignores that one of the necessary elements of recovery is that UMW must have conspired to insist on an agreement "ruinous to the business" of the employer, *Ramsey* (401 US 302, 314), "regardless of the employer's ability to pay." (*South-East*, 434 F.2d 767, 775). In this case the ability was not denied but admitted. The import of the Court's holding is that UMW would be liable for conspiracy damages every time it asked for its standard wages and the employer says, "I can pay it, but I don't want to."

REASONS FOR ALLOWANCE OF THE WRIT

Review should be granted in this case because it presents special and important questions of federal law not settled by this Court. By refusing to consider these questions of first impression, the Court of Appeals has allowed the District Court to decide, and decide incorrectly, questions of Federal law which should be decided by this Court. The Court of Appeals has also so far sanctioned the District Court's departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Prior decisions of this Court, *Pennington* (381 U.S. 657) and *Ramsey* (401 U.S. 302) mark the Court's awareness of the importance of the special area of Federal law involving application of antitrust laws to labor unions. Although both of those cases dealt broadly with the standard of proof necessary to find a Sherman Act violation by a labor union, *in neither case did the Court deal specifically with the sufficiency of circumstantial evidence to support an inference of conspiracy*. Rather, in each case the Court expressly declined to indicate an opinion on that issue.[8]

UMW is aware that weighing the evidence is the duty of the finder of fact, in this case a jury, and that this Court usually does not concern itself with weighing evidence which has been examined in the first instance by the trier of fact and the Courts below.

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[8] In *Pennington* the Supreme Court said (381 US at 665, ftnt. 2): There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency.

In *Ramsey* the Supreme Court said (401 US 303, ftnt. 5): To what extent the proof would fail under the standard we here hold applicable and what legal difference it might make are matters open to be dealt with on remand.

However, the question here concerning the sufficiency of the evidence is a question of law, an important one not reached by this Court in *Pennington* or *Ramsey*.

It is vital for UMW, other labor unions, and employers to know with as much certainty as possible what conduct is and is not susceptible of interpretation as indirect evidence of conspiracy; to know when circumstantial evidence will be viewed to establish conspiracy as opposed to coincidence of motives. "Otherwise, every employer and every union signing a collective bargaining agreement might well find themselves unavoidably exposed to an antitrust charge." (Second *Ramsey*, 344 F. Supp. 1029, 1039).

The legal question concerning the sufficiency of the evidence involves the "equal hypotheses rule." This Court has not explored this rule in its UMW conspiracy cases, and both the District Court and Court of Appeals unaccountably ignored it in their decisions in this case.

The rule was correctly explained and specifically approved by the Sixth Circuit in *South-East* (434, F.2d 767, 777-8). The rule is simply a negative phrasing of the rule that a plaintiff must sustain his burden of proof:

> When there are equal [illegible] which can be drawn from a particular set of fa[illegible]erence indicating liability, the other non-liabil[illegible]ne judge's obligation at the directed verdict sta[illegible] of the trial to find for the defendant. (at 777)

UMW contends that the rule should have been applied by the District Court to grant either the motion for directed verdict or for judgment N.O.V. As explained in the Statement of the Case, above, each item of evidence advanced by the District Court to support the jury verdict was demonstrably equal inference evidence, at most.

The District Court avoided dealing with this question of law by simply refusing to consider it. Denying that this was a case of first impression, the Court stated that UMW's argument of insufficient evidence to support a jury verdict was no different from those considered and rejected by the Sixth Circuit in *Tennessee Consolidated* and *South-East*. The Court could not have been more greatly mistaken.

Far from rejecting the "equal hypothesis rule," the Sixth Circuit specifically embraced it in *South-East*, as quoted above. The rule was not involved in the disposition of the case, because the Court found direct evidence of conspiracy on the part of two co-defendant operators, consisting of a cancellation of a sales contract between the South-East and Consolidation Coal Companies. The Court of Appeals expressly declined to consider the circumstantial evidence alone, except to allow that it "in and of itself might not support the jury's verdict." (434 F.2d 767, 789). It is irrefutable that had it been necessary to the decision, the Court of Appeals would have applied the equal hypothesis rule.

Furthermore, in a footnote in *South-East*, at page 778, the Court of Appeals makes it clear that the equal inference rule was not considered in its decision in *Tennessee Consolidated:*

> It is doubtful that the equal inference instruction given in *Tennessee Consolidated* to the jury was correct. However, this apparently was not assigned as error on appeal as no mention whatsoever is made of that instruction or the propriety of its use in the appellate opinion in the case.

Besides misconstruing the meaning of *South-East* and *Tennessee Consolidated*, the District Court also misinterprets the second *Pennington* (257 F. Supp. 815) and the second *Ramsey* (334 F. Supp. 1029) cases, erroneously stating that they were treated by the District Judges as if there was a conflict in the evidence, with weighing of facts.

On the contrary, Judge Wilson makes implicitly clear in *Ramsey* (at pages 1038-39) that his refusal to engage in "impermissible speculation" as to motivation from conduct and statements productive of two possible inferences is a matter of law and is tantamount to a directed verdict in a jury case. The Sixth Circuit shared this view of Judge Wilson's decision, as evidenced by comments in *South-East* (434 F.2d at 778).[9] Obviously, the same view applies to Judge Taylor's decision in second *Pennington*.

Therefore, because it is beyond dispute that this case presents the question of application of the equal inference rule to circumstantial evidence in a jury trial, whereas *South-East* and *Tennessee Consolidated* did not; and because it appears that the District Court and Court of Appeals grievously departed from the proper application of the rule, as set forth in *South-East* and applied in second *Pennington* and second *Ramsey*, this Court should settle this question.

The writ should be allowed because the case presents other important questions of first impression. Unlike *South-East* and *Tennessee Consolidated*, this case involves a period of alleged damages dating *after* the removal of the PWC. This Court has not had the opportunity to consider the important question of the extent to which the PWC may form the basis for an inference of conspiratorial conduct occurring after its elimination. The District Court erred in deciding this question, and this Court should settle the issue.

Finally, this case presents another unique and previously unconsidered question, involving Scotia's stated ability to pay the

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[9] The *Ramsey* case relied upon by appellants was a non-jury case. On appeal an observation—not an instruction—made by the District Judge in his opinion was quoted with approval. Since the "equal inference" rule or doctrine is used by the trial judge in deciding the question of whether a directed verdict should be granted a defendant because plaintiff has not satisfied his burden of proof, it is both logical and correct that this rule entered the trial judge's thinking in the non-jury trial in *Ramsey*.

wage demanded by UMW. In none of the related conspiracy cases has there been a comparable issue.

The distinction is vital, because in *Ramsey* this Court said (401 US at 314):

> Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards *ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed upon conduct.* (Emphasis added.)

The Sixth Circuit expressed the same thought in *South-East* (434 F.2d at 775) with the phrase "regardless of their ability to pay."

The evidence of Scotia's ability to pay is incompatible with such a conspiracy. It is destructive of the required concept that UMW conspired to impose the National Wage Agreement with the knowledge that Scotia would be unable to comply.

Scotia professed not only an ability to pay, but a willingness to pay UMW's requested wage, provided UMW would commit itself not to organize the Leatherwood mine.

Since, a priori, all demands for increased wages have the potential to "damage" the employer by reducing his profit margin, how may the labor union bargain at all in this context if the District Court is correct in its interpretation that "ruinous to the business" means only that the employer suffers damages? Under that reasoning, ability to pay has only the subjective meaning given to it by the employer in each particular case.

In this case, Blue Diamond's own President Bonnyman plainly admitted representing to UMW a willingness to sign the contract on behalf of Scotia. He admitted that he told UMW that "we would entertain the idea of signing a contract subject to

working out certain coal conditions, but we could not afford to do it in the Leatherwood field." That statement can be interpreted in no other way but that *Scotia could afford* to sign the contract. UMW was left with the choice of dropping its fight to gain national standards at Scotia, or obtaining them only at the cost of giving a sweetheart commitment, outside its NLRA mandate to bargain for Scotia employees, to abandon whatever opportunity the Leatherwood employees had for UMW representation.

Under such circumstances, it simply cannot be said that UMW's wage demands were "ruinous to the business" of Scotia. If Scotia was damaged, it was purely because it refused to meet UMW's demands except on its own terms, terms which were, we submit, properly rejected by UMW, and not because of an inability to pay.

Surely, such was not the intent of Congress, nor of this Court, which should consider and clarify this critical issue.

CONCLUSION

By the time of the contract negotiations and strike in this case, UMW had been advised by this Court's *Pennington* decision it had the right to pursue unilaterally and without agreement with any employer group a uniform wage policy.

By then, UMW had divested itself of any interest in West Kentucky Coal Company, the evidence of which had been stressed in the *Pennington* case. It had eliminated the Protective Wage Clause from its basic agreement.

It sought in its Scotia negotiations nothing, either in substance or manner, this Court had said it could not seek.

Still, largely on the basis of remarks of years then well past, of legendary figures in the coal industry—John L. Lewis, George

Love, Harry Moses—each of whom by the time of the dispute had either long since departed this earth or an active role in the industry, a jury was permitted to infer a motivation on UMW's part to do something in an unlawful way that it had the clear right to do in a lawful way.

No Court, in a non-jury case, that has heard anyone of the several UMW Pennington-type antitrust cases has concluded other than that the evidence did not establish a case. That a jury has reached a contrary result under the circumstances discussed herein and involving not a "small" operator of the type who gave origin to this apparently endless line of cases, but rather one of the strongest regional coal companies in the United States, is of manifest significance to the responsibilities and rights of organized labor and warrants the review of this Court.

For the reasons set forth above, Petitioner prays for the issuance of a writ of certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

JUDGMENT—DISTRICT COURT

(Entered August 19, 1975)

This action came on for trial before the Court and a jury, Honorable Pierce Lively, Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation, presiding, and the issues having been duly tried and the jury having duly rendered its verdict awarding the plaintiff the sum of Seven Hundred, Seventy Thousand, Sixty Nine Dollars and Three Cents ($770,069.03) in damages; and pursuant to Title 15, Section 15, United States Code, it is Ordered and Adjudged that the plaintiff Scotia Coal Company recover of the defendant United Mine Workers of America three-fold the damages by it sustained as reflected in the verdict, a total of Two Million, Three Hundred Ten Thousand, Two Hundred Seven Dollars and Nine Cents ($2,310,207.09) with interest therein at the rate of 6% as provided by law and its costs of action.

Dated at Lexington, Kentucky, this 19th day of August, 1975.

DAVIS T. McGARVEY, Clerk
By: (Illegible)
Deputy

MEMORANDUM—DISTRICT COURT

(Filed August 30, 1976)

On August 19, 1975 the jury returned a verdict for the plaintiff in this antitrust action in the amount of $770,069.03. The defendant had made a motion for a directed verdict at the con-

clusion of the plaintiff's case in chief which was renewed at the close of all the evidence. Following entry of a judgment for treble damages the defendant filed motions for judgment notwithstanding the verdict, or in the alternative for a new trial, and the plaintiff filed a motion to amend the judgment to provide for the allowance of attorney's fees. The court was prepared to rule and suggested that a hearing for arguments on all motions be held on September 4, 1975. Counsel for both parties requested that the court not pass on the motions at that time, but that rulings be delayed until the transcript of trial had been prepared and the parties had had an opportunity to brief the issues. The court reluctantly agreed, and now finds itself with the necessity of ruling on these motions without a transcript since the reporter has not been able to furnish it to date. The attorneys were notified on July 19, 1976 that the court would require the pending motions to be submitted on briefs which were to be filed no later than August 10, 1976.

Because of the manner in which counsel chose to present this case, the court does not believe that the transcript is essential to a decision on the pending motions. The issues were developed primarily through the introduction of a large volume of documentary evidence, much of it by stipuation. Since there had been several similar trials, involving different plaintiffs but the same counsel as those who appeared in this case (and a previous trial of this case), the attorneys agreed that a number of exhibits, depositions, interrogatories and answers thereto and other documentary matter would be received as evidence in this case and that the attorneys would read pertinent parts to the jury. Thus we were into the third day of trial before the first live witness was produced by the plaintiff. The court made detailed bench notes of the testimony of witnesses and of objections and rulings thereon both to the introduction of exhibits and with respect to testimony of witnesses who appeared.

Motion for Judgment N.O.V.

In its brief in support of its motion for judgment n.o.v. the defendant has mounted a broad attack on the plaintiff's evidence which boils down to the argument that there is no substantial evidence in the record which shows the existence of a conspiracy between UMW and large coal operators primarily represented by the Bituminous Coal Operators Association (BCOA) to impose the terms of the national coal industry agreement on other non-BOCA operators, including Scotia. This argument would have greater appeal if this were a case of first impression. However, in *Tennessee Consolidated Coal Co. v. UMW*, 416 F.2d 1192 (1969), *cert. denied*, 397 U.S. 964 (1970), and *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767 (1970), *cert. denied*, 402 U.S. 983 (1971), the Court of Appeals for the Sixth Circuit upheld jury verdicts where the argument was made. While it is true that there are some differences between the proof which the jury heard in the two cited cases and in *Scotia*, in many essential areas the evidence is similar or identical. Furthermore, in two similar cases in which district courts sitting without juries upon remand after reversal on other issues found for the defendants, there was no indication that the defendants were entitled to involuntary dismissals under Rule 41(b), Fed. R. Civ. P., at the close of the plaintiff's cases. Rather, these cases were treated as ones where there was a conflict in the evidence and the findings of the district court were upheld as not clearly erroneous. *See Lewis v. Pennington*, 257 F.Supp. 815 (E.D. Tenn. 1966), *aff'd*, 400 F.2d 806 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968); and *Ramsey v. UMW*, 344 F.Supp. 1029 (E.D. Tenn. 1972), *aff'd*, 481 F.2d 742 (6th Cir.), *cert. denied*, 414 U.S. 1067 (1973).

One would not expect direct testimony of an agreement to violate the Sherman Act and no such direct testimony was produced in this case. There were direct denials by officials of UMW and BCOA. However, applying the guidelines found in

the opinions of the Supreme Court in *UMW v. Pennington*, 381 U.S. 657 (1965) [*Pennington I*], and *Ramsey v. UMW*, 401 U.S. 302 (1971) [*Ramsey I*], and of the Sixth Circuit in *Tennessee Consolidated*, supra and *South-East Coal*, supra, it appears to me that there was sufficient evidence from which the jury could reasonably infer that an agreement existed between UMW and BCOA or some of its members under which UMW would insist that coal companies which were not members of BCOA would be required to accept the terms of the national agreement or have no contract with UMW. UMW agrees that its insistence on Scotia's acceptance of the terms of the national agreement was nothing more than a continuation of its historic policy of seeking uniformity of wage rates for coal miners throughout the country. Obviously, if the evidence were clearly to the effect that UMW was doing nothing more than unilaterally pressing for a uniform wage policy, there would be no liability to Scotia because of its insistence that Scotia accept a contract embodying this policy. *Pennington I*, supra.

UMW argues that the Protective Wage Clause (PWC) which was inserted into the national contract as a 1958 amendment is not evidence of an express agreement to violate the antitrust laws. In *Tennessee Consolidated*, supra, the Sixth Circuit Court of Appeals found that the PWC is ambiguous and that it was the duty of the jury to determine its meaning. The court also held that evidence of surrounding circumstances and the practical construction of the parties was admissible to assist the jury in interpreting the Clause. I find that the language of the PWC, together with the evidence admitted in this case of the surrounding circumstances and construction placed upon the language of the Clause by the parties, was susceptible of a construction which would support the inference by the jury that an agreement existed in violation of the Sherman Act.

UMW argues that the previous cases in which the Sixth Circuit upheld jury verdicts for plaintiffs involved damage periods

prior to 1964 when UMW claims the PWC was deleted from the national contract. Since Scotia has claimed damages for a period beginning after 1964, it is argued that even if there was evidence of an illegal agreement, the conspiracy terminated with the removal of the PWC in 1964 and Scotia has failed to connect its alleged damages to the claimed antitrust violation. I do not believe that the fact that the PWC was removed from the national agreement in 1964 was determinative of the issues in this case.

There was evidence other than the PWC itself from which an agreement could be inferred. Though the PWC did not appear in the contract after 1964, the conduct of the parties in 1965 and 1966 might be construed as indicating that the underlying agreement which the PWC sought to implement continued implicitly through the period of claimed damages by Scotia. Additionally, the "80-cent Wage Clause" might have been viewed by the jury as a continuation of the underlying purpose of the Protective Wage Clause. *See South-East Coal Co. v. UMW*, 434 F.2d at 782-83. Furthermore, there was evidence that since the formation of BCOA in 1950, the UMW has not approved any bituminous contract except under the national contract terms, and its leaders as well as the leaders of BCOA have publicly expressed a preference for concentration of the coal industry in strong hands.

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), the Supreme Court said, "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." The jury was required to look at the evidence as a whole rather than as isolated bits and pieces and I am constrained to view it in the same way in passing on a motion for judgment n.o.v. The jury returned a general verdict for the plaintiff in this case and did not necessarily base its finding of a violation of the

antitrust laws solely or to any extent, upon the inclusion of the PWC in the national agreement.

In its brief UMW also argues that the uncontroverted testimony of the president of Scotia's parent, Blue Diamond, shows that the plaintiff was fully able to meet the demands of UMW at the Scotia mine and offered to do so in exchange for an agreement by UMW not to attempt to organize the Leatherwood Mine which was also owned by Blue Diamond. UMW quotes from *Ramsey I*, 401 U.S. at 313, "Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed-upon conduct." UMW argues that the testimony of Mr. Bonnyman shows that the UMW demand was not ruinous to Scotia and that it brought the strike and consequent damages upon itself by asking UMW to violate its principles by agreeing to make no attempt to organize the Leatherwood Mine.

The phrase, "ruinous to the business" does not appear to me to establish an absolute requirement for recovery in this type case. If a conspiracy in violation of the antitrust laws is shown, the victim of the conspiracy should be able to recover its damages whether they result in absolute ruin or not. Moreover, while the testimony of Mr. Bonnyman contains references to the fact that Scotia was a profitable operation at the time of the discussion with UMW in 1965 he also stated that it would have been disastrous for Scotia to have met the terms of the national contract. Though the jury could have viewed the Bonnyman testimony as establishing a totally unrelated cause of Scotia's damages, I do not believe that this testimony, consisting of several pages of questions and answers in a deposition taken in a previous case, completely eliminated every reasonable inference that Scotia suffered damages as the result of an illegal agreement between UMW and BCOA. Though UMW emphasizes "the Leatherwood issue" in its brief, the testimony of Bonnyman was not presented at the trial as the one fundamental difference between this case and the *Tennessee Consolidated* and *South-East Coal* cases. Actually, in its brief UMW uses such expressions as "fairly to be inferred" and "in so many words." While the Bonnyman testimony could be viewed as supporting the interpretation placed upon it by UMW, it does not compel such a conclusion.

In ruling on a motion for a directed verdict or for judgment n.o.v. the court is guided by the decision of the Supreme Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, supra, and by numerous decisions of the Court of Appeals for the Sixth Circuit. In *Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3471 (Feb. 23, 1976), Judge McCree, writing for the court, stated: "The district court, however, does not sit as trier of fact *de novo*; its function in deciding this motion for judgment *n.o.v.* was limited to determining whether a reasonable person could arrive at the conclusion agreed upon by the jury." Viewing the evidence in the light most favorable to Scotia, I conclude that there was sufficient evidence to raise an issue of material fact for the jury, *O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975); *Reeves v. Power Tools, Inc.*, 474 F.2d 375, 380 (6th Cir. 1973), and that a reasonable person could reach the conclusion agreed upon by the jury.

The Motion for a New Trial

UMW argues that the evidence does not support the award of damages in the amount of $770,069.03. Plaintiff's exhibit 37 showed that Scotia's profit for the 12-month period from June 1965 through May 1966 was $770,069.03. Though Scotia claimed this loss of profits plus the adjusted losses in-

curred during the period covered by this lawsuit, June 1966 through May 1967, in the total amount of $972,922.31, the jury could have reasonably concluded that the actual profit for the immediately preceding 12-month period was a fair measure of the damages suffered by Scotia. In *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), the Supreme Court held that a plaintiff in an antitrust suit is not required to prove damages with exactitude where the wrongful actions of the defendants have made computation difficult or impossible. The Court held that comparison of receipts in a period immediately prior to the alleged operation of the conspiracy with those afterward was an acceptable measure of damages. The Court further approved the jury's setting damages on the basis of reasonable estimates from the evidence, acting on "probable and inferential, as well as direct and positive proof." *Id.* at 264. In *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, 358 F.2d 790 (1966), the Sixth Circuit held that the jury in an antitrust action is not limited to awarding damages for specific items as proven but may award general damages also. I do not find the award of damages to be so speculative as to require a new trial.

In its brief UMW points to a number of evidentiary rulings as bases for a new trial. It complains specifically of a letter from Edward C. Fox to James L. Hamilton dated March 12, 1964. This exhibit was offered during the plaintiff's case in chief and the court sustained an objection to it. The exhibit was again offered by the plaintiff in rebuttal and the court admitted the exhibit under the co-conspirator exception to the hearsay rule. Mr. Fox was president of BCOA and this letter written to a member company of BCOA could, when viewed with all of the other evidence in the case, be seen as confirming the existence of an agreement between BCOA and UMW to deal with the "matter of the competition of those in the bituminous industry who are non-signators of the National Bituminous Coal Wage Agreement . . . ."

UMW also complains of the admission of proceedings of UMW conventions and excerpts from UMW journals dating from the 1930's through 1974. This matter was brought up at a pre-trial conference immediately before the start of the trial and the court ruled that a limited number of such items could be introduced to show the historical background of the case. The court sustained objections to any documentary evidence concerning corruption in UMW in the period of 1972-1973 when Tony Boyle's name was so prominently featured in the news media. The court permitted an amendment to the complaint to show that the alleged combination and conspiracy had its origins at the time of the formation of BCOA in 1950 and both UMW and Scotia introduced evidence of occurrences prior to that date. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, supra, the Court criticized the persistent exclusion by the trial court of evidence of activities prior to the beginning of a conspiracy and said that these items should have been admitted to show a course of conduct. Furthermore, in the present case a separate instruction was given that exhibits had been permitted pertaining to events which occurred prior to 1950 for the limited purpose of explaining the historical background of the case and to show the bargaining principles followed by UMW prior to that time. The jury was instructed: "These exhibits are not, of themselves, evidence of an illegal combination or conspiracy and you may not find the existence of such a combination or conspiracy from these exhibits alone."

It is to be recalled that the parties agreed fully on the instructions in the case and in fact requested the court to give the same instructions which Judge Moynahan had given at a previous trial of this case which resulted in a hung jury. There were no objections to the few alterations in the previous instructions which were made by the court at this trial.

Attorneys' Fees

The plaintiff has made a motion for an allowance for attorneys' fees in the amount of $210,000. This motion is supported by an affidavit of Mr. Rowntree concerning his time and the time of co-counsel. A motion for attorneys' fees is addressed to the sound discretion of the court which must consider factors such as the nature, extent and difficulty of the services rendered; the time spent by the plaintiff's attorneys in the preparation and trial of the case; the attorney's ability, skill and standing in the profession, including his specialized skill in the field of antitrust litigation; the results accomplished in the litigation, and the amounts customarily charged or allowed for similar services within the area. The above is taken from Judge Wilson's opinion in the *Tennessee Consolidated* case. I have considered these factors and the awards which were approved by the Sixth Circuit in *Tennessee Consolidated* and *South-East Coal Co.* and have concluded that a fee of $150,000 should be allowed in this case.

/s/ PIERCE LIVELY
District Judge
Sitting by Designation

This 27th day of August, 1976

AMENDED JUDGMENT—DISTRICT COURT

(Filed August 30, 1976)

Pursuant to the Court's direction in numerical paragraph three of its Order of August 27, 1976 filed on August 30, 1976,

It Is Ordered and Adjudged that the Judgment entered herein on August 19, 1975 in favor of the plaintiff in the total sum of Two Million, Three Hundred Ten Thousand, Two Hundred

Seven Dollars and Nine Cents ($2,310,207.09) be and it is hereby amended to provide for an additional allowance of attorneys' fees to the plaintiff in the amount of One Hundred Fifty Thousand Dollars ($150,000.00) thereby making a total award to the plaintiff, Scotia Coal Company and against the defendant, United Mine Workers of America a total sum of Two Million Four Hundred Sixty Thousand, Two Hundred Seven Dollars and Nine Cents ($2,460,207.09) with interest thereon at the rate of 6% as provided by law and its costs of action.

Dated at Lexington, Kentucky, this 30th day of August, 1976.

/s/ DAVIS T. McGARVEY, Clerk

ORDER—COURT OF APPEALS

(Filed April 28, 1978)

Before: EDWARDS, PECK, and MERRITT, Circuit Judges.

This appeal, perfected from a judgment entered pursuant to jury verdict in this action brought under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, has been submitted on the record on appeal and on the briefs and arguments of counsel. It is plaintiff-appellee's contention that over a protracted period of time appellant and the major coal companies, especially the dominant members of the Bituminous Coal Operators Association, engaged in a continuous conspiracy to monopolize and restrain trade in the bituminous coal industry and to eliminate competition for the benefit of the major coal companies. Its further contention is that appellant and the major coal companies used the collective bargaining process as a means of imposing costs on smaller coal companies such as the appellee,

thereby eliminating their competition. In response, appellant contends that its consistent policy in wage negotiations, from the union's organization in the 1890's, has been to achieve national uniformity in wage rates and labor standards in the coal industry. The trial court followed the holding of the Supreme Court in *Ramsey v. United Mine Workers of America*, 401 U.S. 302, 91 Sup. Ct. 658 (1971), to the effect that the clear proof standard indicated in the Norris LaGuardia Act, § 6, 29 U.S.C. § 106, was without application. The fact that the Court's instructions to the jury were stipulated by counsel for the parties and agreed upon prior to the giving of said instructions precludes our review thereof. After a review of the record, it is concluded that there was sufficient evidence to permit the case to be submitted to the jury, and to sustain its verdict. Accordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk of Court

STATUTES

15 USCA:

§ 1: TRUSTS ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693, July 7, 1955, c. 281, 69 Stat. 282.

§ 2. MONOPOLIZING TRADE A MISDEMEANOR; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be pun-

ished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

* * * * * * *

§ 15. Suits by Persons Injured; Amount of Recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 17. Antitrust Laws Not Applicable to Labor Organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

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29 USCA Sec. 52 (Sec. 20 of the Clayton Act):

§ 52: Statutory Restriction of Injunctive Relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.

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29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§ 102: PUBLIC POLICY IN LABOR MATTERS DECLARED

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized workers is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

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29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§ 104: ENUMERATION OF SPECIFIC ACTS NOT SUBJECT TO RESTRAINING ORDERS OR INJUNCTIONS

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in

any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.
